LIBRARY
SUPREME COURT, U. S.

Office, Supreme Court, U.S.
FILED
MAR 28 1958
JOHN T. FEY, Clerk

No. 492

In the Supreme Court of the United States

OCTOBER TERM, 1957

WALTER W. FLORA, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
JOHN N. STULL,
HARRY BAUM,
DAVID O. WALTER,
Attorneys,
Department of Justice, Washington 25, D. C.

judgment, which the United States pledges herself to pay.

* * * * *

* * * While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. * * * If the compliance with this condition requires the party aggrieved to pay the money, he must do it. He cannot, after the decision is rendered against him, protract the time within which he can contest that decision in the courts by his own delay in paying the money. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable. * * *

The objecting party can take his appeal. He can, if the decision is delayed beyond twelve months, rest his case on that decision; or he can pay the amount claimed, and commence his suit at any time within that period. * * *

It may be noted that the Court refers to paying "the tax" or paying "the tax claimed," or paying "the amount claimed," as a prerequisite to suit. More important, if it were thought that by a token payment only the taxpayer could litigate the validity of the entire assessment, the Court's justification of the hardship to the taxpayer would have been unnecessary.

This Court has frequently cited the *Cheatham* case, both before the 1921 provisions (*Savings Institution* v. *Blair*, 116 U. S. 200, 205–206; *Dodge* v. *Osborn*, 240 U. S. 118) and since (*Graham* v. *du Pont*, 262 U. S. 234, 254–255; *Phillips* v. *Commissioner*, 283 U. S. 589, 595; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 395–396; *Dobson* v. *Commissioner*, 320 U. S. 489, 496). In these cases, and in others not specifically referring to the *Cheatham* case, the Court has consistently adverted to the requirement of payment of the tax as a condition precedent to suit in terms which in their context can only show that payment of the entire tax was called for. In *Bailey* v. *George*, 259 U. S. 16, 20, for example, in which the Court denied an injunction against collection of the child labor tax (which it held unconstitutional in the *Child Labor Tax Case*, 259 U. S. 20, decided the same day), the Court pointed out that "They might have paid the amount assessed under protest and then brought suit against the Collector to recover the amount paid with interest." In other cases, decided after the enactment of the 1921 Act, the Court has consistently referred to the principle of "pay first and litigate later" (Mr. Justice Reed, concurring, in *Allen* v. *Regents*, 304 U. S. 439, 456) in terms which show that the entire tax, and not merely a token amount, must be paid. In *Bull* v. *United States*, 295 U. S. 247, 260, the Court remarked that "Payment precedes defense * * *." Again in *Phillips* v. *Commissioner*, 283 U. S. 589, 596, 598, 599, involving a question of transferee liability, the Court referred to "the need

of the government promptly to secure its revenues" and to "the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery" as "paramount." It pointed out that the transferee has his remedy of suit where he has paid "the tax." In *Blair* v. *Birkenstock*, 271 U. S. 348, the Court held that an installment payment of a part of a tax is not the tax. In all these cases, it is plain from the context that, when the Court refers to the statutes as requiring payment of the tax prior to suit, it is construing them as requiring payment of the entire tax.

3. THE ESTABLISHMENT OF THE BOARD OF TAX APPEALS

Similarly, the recommendations of the congressional committees and the action of Congress itself in creating the Board of Tax Appeals in 1924 are explainable only on the assumption that the taxpayer was obliged under the statutes authorizing refund suits to pay the entire tax before bringing suit for refund. If taxpayers could have obtained a judicial determination of their tax liability in advance of the payment of the whole by making a token payment and suing for refund, there would have been no hardship to alleviate and no need for the Board of Tax Appeals (now the Tax Court). The House Committee on Ways and Means explained the reason for the creation of the Board of Tax Appeals in part as follows (H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7–8 (1939–1 Cum. Bull. (Part 2) 241, 246–247):

> The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer

> may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he can not, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in nonliquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment.

The Senate Committee on Finance offered a similar explanation. S. Rep. No. 398, 68th Cong., 1st Sess., pp. 8–9 (1939–1 Cum. Bull. (Part 2) 266, 271).[2]

---

[2] Again, in the reports on the Revenue Bill of 1926, the understanding of Congress that the entire tax must be paid is reflected. The House Report (H. Rep. No. 1, 69th Cong., 1st Sess. (1925), p. 10 (1939–1 Cum. Bull. (Part 2) 315, 321), in recommending a right of appeal from Board of Tax Appeals decisions, states—

> Under the existing law, after the commissioner determines a deficiency, the taxpayer has 60 days within which

As this Court stated in *Old Colony Tr. Co. v. Commissioner*, 279 U. S. 716, 721:

> The Board of Tax Appeals * * * was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes by the Board *in advance of their paying the tax found by the Commissioner to be due.* Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of *the amount of tax after its payment.* [Italics supplied.]

To permit the District Court to entertain the taxpayer's suit in the instant case and decide the merits of the controversy would for all practical purposes blur, if not completely erase, this jurisdictional line drawn by Congress between pre-payment petitions for redetermination of an asserted deficiency (over which the Tax Court alone has jurisdiction) and post-payment suits for refund (over which the District Courts and the Court of Claims have concurrent jurisdiction). The respective jurisdictional areas delineated by Congress, instead of providing taxpayers a choice

---

to appeal his case to the Board of Tax Appeals. If the Board of Tax Appeals renders an adverse decision, the taxpayer can then pay his tax and file a claim for refund, which, when rejected by the commissioner, still gives him the right to file a suit in the courts to recover the tax so paid. Under the procedure recommended in this bill the taxpayer, upon receipt of a letter from the commissioner setting forth a deficiency, has only one opportunity to take his case to the courts. * * *

See also S. Rep. No. 52, 69th Cong., 1st Sess. (1926), p. 25 (1939-1 Cum. Bull. (Part 2) 332, 351).

of either of the two methods of litigating the deficiency, would overlap and afford taxpayers a third and hybrid choice never contemplated by Congress—a right to sue for refund after a partial pre-payment of the deficiency.

4. THE CONGRESSIONAL POLICY EXPRESSED IN FUNCTIONALLY RELATED STATUTES

The construction by the court below of the statute here involved is also supported by consideration of related provisions. These provisions emphasize the congressional purpose to preclude the adjudication of tax liability in the District Courts unless the full amount of the contested deficiency has been paid. It has long been established, for example, that the collection of a tax may not be enjoined, except in unusual circumstances. The provision of Section 7421 of the 1954 Code that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court merely reenacts this long-established rule, derived through Revised Statutes, Section 3224, from Section 10, Act of March 2, 1867 (c. 169, 14 Stat. 471). See *Snyder* v. *Marks*, 109 U. S. 189, and *Graham* v. *du Pont*, 262 U. S. 234; cf. *Shelton* v. *Platt*, 139 U. S. 591, 594–595.

Even more significant is the fact that the Federal Declaratory Judgments Act (Section 274D, Judicial Code, as added by the Act of June 14, 1934, c. 512, 48 Stat. 955) was amended by Section 405 of the Revenue Act of 1935 (c. 829, 49 Stat. 1014) expressly

QUESTION PRESENTED

Whether the United States District Court has jurisdiction of a tax refund suit, challenging the correctness of an income tax deficiency asserted by the Commissioner of Internal Revenue, where the taxpayer has paid only a part of the deficiency.

STATUTES INVOLVED

28 U. S. C.:

SECTION 1346. *United States as defendant*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) [as amended by Sec. 1, Act of July 30, 1954, c. 648, 68 Stat. 589]. Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; *

* * * * *

Internal Revenue Code of 1954:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or

his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * *

(26 U. S. C. 1952 ed., Supp. IV, Sec. 7422 (a):)

STATEMENT

The relevant facts are not in dispute. During the year 1950, the taxpayer engaged in transactions involving the purchase and sale of commodity futures and commodities, suffering a net loss of $85,216.10. This was reported as an ordinary loss, but was allowed only as a capital loss by the Commissioner of Internal Revenue, resulting in an addition to the income of taxpayer of $42,608.05, and an assessment of additional tax, plus interest, of $28,908.60. A later assessment was made of a penalty of $45, plus interest. Taxpayer paid a total of $5,058.54 on these assessments, and filed a claim for refund. (R. 11.) Upon its disallowance, this suit followed. (R. 1–3.) The United States counterclaimed for the balance of the deficiency. (R. 5.)

The United States filed a motion to dismiss on the ground that jurisdiction was lacking, since taxpayer had not paid the entire amount of the deficiency assessment. The District Court overruled the motion to dismiss. (R. 5–6.) In its opinion, the District Court reviewed the question of jurisdiction (R. 6–9), concluding that the taxpayer "should not maintain the instant suit" (R. 9); however, since the Court of Appeals for the Tenth Circuit had not passed on the question, the court considered the merits of the case.

On the merits, it decided that the losses sustained were capital losses and entered judgment denying taxpayer's refund claim and in favor of the the United States on its counterclaim. (R. 12–13.)

On appeal, the Court of Appeals did not reach the merits, but decided that, since taxpayer's complaint affirmatively showed that only a partial payment on the deficiency assessment had been made, the District Court was without jurisdiction. It remanded the case to the District Court with directions to vacate the judgment for the United States on its counterclaim and to dismiss the action without prejudice. (R. 18–19.)

SUMMARY OF ARGUMENT

The courts below correctly held that, since taxpayer had failed to pay the full amount of the challenged income tax deficiency, he could not contest its validity by way of a refund suit in the District Court. The history of the statutory provision vesting in the District Courts jurisdiction of tax refund suits, the statutory scheme for determining and collecting an income tax deficiency asserted by the Commissioner of Internal Revenue, the reasons underlying the creation of the Tax Court as an independent tribunal for adjudicating the correctness of a deficiency in advance of its payment, and decisions of this Court regarding the different roles played by the Tax Court and District Courts in the administration of the taxing statute, all make it clear that full payment of a contested deficiency is a condition precedent to a suit for refund in the District Court. Related statutory provisions, such as the prohibition of injunctions against collec-

tion of taxes and the exception of tax controversies from the operation of the Federal Declaratory Judgments Act, confirm this.

Under the system devised by Congress for adjudicating tax controversies, long followed by the Treasury and accepted by taxpayers, a taxpayer who challenges the propriety of the Commissioner's deficiency determination has a choice of either filing a petition for redetermination in the Tax Court prior to payment, or of first paying the deficiency and then suing for refund in the District Court (or Court of Claims). He may not, as taxpayer here seeks to do, elect to pursue a hybrid method by making a token payment of part of the deficiency (presumably even a dollar would suffice), withhold the balance, and litigate the correctness of the entire deficiency in the guise of a refund suit. To permit a taxpayer to invoke the jurisdiction of the District Court simply by paying a part of the deficiency would not only invite a multiplicity of suits with respect to the same tax deficiency, but for all practical purposes would obliterate the jurisdictional line drawn by Congress between the Tax Court and the District Court. If there is to be any change in the established system, it should be accomplished by Congress which designed the system, not by judicial decision.

That the Government might have resorted to its seizure powers in order to collect the portion of the deficiency which taxpayer failed voluntarily to pay does not, as taxpayer assumes, confer upon the District Court authority to entertain the refund suit and de-

termine the validity of the entire deficiency. The Government was under no duty after commencement of the suit to remove the jurisdictional defect by seizing taxpayer's property in satisfaction of the unpaid balance. Nor is the taxpayer subjected to undue hardship, as he claims, by conditioning his right to bring a refund suit in the District Court upon prepayment of the full deficiency, for he was at liberty by filing a timely petition in the Tax Court to contest the entire deficiency in that forum without paying any part of it in advance—not even the token amount he chose to pay.

ARGUMENT

THE TAXPAYER HAVING FAILED TO PAY THE FULL AMOUNT OF THE CONTESTED DEFICIENCY, THE COURTS BELOW CORRECTLY HELD THAT THE DISTRICT COURT WAS WITHOUT JURISDICTION OF THE TAXPAYER'S SUIT FOR REFUND

1. INTRODUCTION

Taxpayer was notified of a deficiency in income tax for the taxable year 1950 of $27,251.13, plus interest, on the ground that an amount deducted in his return as an ordinary loss was deductible only as a capital loss. If he wished to contest this liability prior to payment of the additional tax, he could have petitioned the Tax Court for a redetermination of the deficiency, with the usual right of appeal if dissatisfied with the Tax Court's decision (Internal Revenue Code of 1954, Sections 6211–6215, 6512, 7482). As an alternative procedure, taxpayer could have paid the additional tax, filed a claim for refund, and upon its disallowance have brought an action in the District Court or Court of Claims (Internal

Revenue Code of 1954, Section 7422; 28 U. S. C., Sections 1346 (a) (1), 1491, and 1291). Each of these two procedures has advantages and disadvantages.

Taxpayer, however, chose neither; but instead made a partial or token payment of $5,058.54, and then filed his refund claim, followed by the present suit. The issue here is whether the suit is authorized under the applicable statutes.

It is elementary that the Government may be sued only with its consent. The consent here involved is found in 28 U. S. C., Section 1346 (a) (*supra*, p. 2), which confers upon the District Courts jurisdiction of suits—

> * * * for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected * * * or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; * * *

Corollary Section 7422 (a) of the Internal Revenue Code of 1954 (*supra*, pp. 2–3) provides that such suits, described in similar language, may not be maintained in any court until a claim for refund or credit has been duly filed with the Secretary of the Treasury or his delegate.

Obviously, before there can be a refund or a recovery, there must have been a payment to be refunded or recovered. The statutes merely assume that a payment has been made, voluntarily or involuntarily. Where, as here, the taxpayer files an income tax return and pays the tax shown on the return, and the Commissioner of Internal Revenue asserts a

deficiency which the taxpayer challenges *in toto*, the precise question is whether the terms "any internal revenue tax" and "any sum," as used in the statutes, refer to the entire deficiency, or only to that part of it which the taxpayer chooses to pay.

Taxpayer, relying heavily on the literal meaning of these terms, takes the position that he is entitled to litigate the validity of the Commissioner's deficiency determination by way of a refund suit in the District Court without having first paid the entire deficiency, and, indeed, on the basis of a payment of whatever part of the challenged deficiency he cares to make; presumably even a dollar would suffice. We submit, as both courts below held, that taxpayers' position cannot be reconciled with the legislative background of the applicable statute, functionally related statutory provisions, the Treasury's long-standing interpretation and practice, and relevant decisions of this Court.

Taxpayer's position, in short, ignores the settled and salutary rule that the literal meaning of statutory words yields to legislative policy and purpose. *United States* v. *Amer. Trucking Ass'ns.*, 310 U. S. 534, 542–544; *Harrison* v. *Northern Trust Co.*, 317 U. S. 476; *Ozawa* v. *United States*, 260 U. S. 178, 194. To subscribe to taxpayer's interpretation would, for all practical purposes, destroy the firmly established statutory scheme for judicial correction of erroneous deficiency determinations of the Commissioner of Internal Revenue. It would in effect transfer to the District Courts jurisdiction over a class of tax controversies which Congress has specifically assigned to

the Tax Court (formerly the Board of Tax Appeals)—namely, authority to adjudicate the correctness of an asserted income tax deficiency prior to the taxpayer's payment of the additional tax.

2. THIS COURT'S DECISIONS AND THE EVOLUTION OF THE PRESENT STATUTES

The jurisdiction of the District Courts in tax refund suits originally rested on the Tucker Act (Act of March 3, 1887, c. 359, 24 Stat. 505, Sections 1 and 2), conferring jurisdiction, concurrent with the Court of Claims, of—

> All claims founded upon the Constitution of the United States or any law of Congress, * * *, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *

The jurisdiction of the District Courts was limited to cases where the amount of the claim did not exceed $1,000. In 1911, upon enactment of the Judicial Code, Section 24, Twentieth, the jurisdictional amount was raised to $10,000.

The language of the section of the Judicial Code here involved is derived from Section 1310 (*c*) of the Revenue Act of 1921 (c. 136, 42 Stat. 227), which added to Paragraph Twentieth of Section 24 of the Judicial Code the following:

> Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal-revenue laws, even if the claim exceeds $10,000, if the collector of internal-revenue by whom such tax, penalty, or sum was collected is dead at the time such suit or proceeding is commenced.

The 1921 amendment was intended merely to confer jurisdiction where the claim exceeded $10,000, if the Collector by whom the tax was collected is dead at the time the suit was commenced, but not to make any other change in the settled principles applicable to refund suits (H. Conference Rep. No. 486, 67th Cong., 1st Sess. (1921), p. 57 (1939-1 Cum. Bull. (Part 2) 206, 238)).[1]

One of these principles was that a tax must be paid prior to litigation. Implicit in the decisions applying this principle had been the understanding that the entire tax must have been paid. An early leading case, *Cheatham* v. *United States*, 92 U. S. 85, 88–89, involving the Civil War income tax law, was a refund

[1] The section was reenacted without change in Section 1025 (c), Revenue Act of 1924, c. 234, 43 Stat. 253, and in Section 1122 (c), Revenue Act of 1926, c. 27, 44 Stat. 9. In 1954 the statute was amended to remove the $10,000 jurisdictional limit and to authorize a jury trial (Sec. 2, Act of July 30, 1954, c. 648, 68 Stat. 589).

suit. Section 19 of the Act of July 13, 1866 (c. 184, 14 Stat. 98), provided that no suit should be maintained in any court "for the recovery of any tax alleged to have been erroneously or illegally assessed or collected" until after appeal to the Commissioner and unless filed within a certain time thereafter. The case turned on the questions whether such appeal had been made and whether the time limit had been complied with. Mr. Justice Miller, during the course of his opinion, set out the justification for the requirement of appeal to the Commissioner (pp. 88–89):

> All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them.
>
> * * * Such appeals are allowed to specified tribunals as the law-makers deem expedient. Such remedies, also, for recovering back taxes illegally exacted, as may seem wise, are provided. In these respects, the United States have, as was said by this court in *Nichols* v. *United States*, 7 Wall. 122, enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal-revenue branches. That system is intended to be complete. * * *
>
> So also, in the internal-revenue department, the statute which we have copied allows appeals from the assessor to the commissioner of internal revenue; and, if dissatisfied with his decision, on paying the tax the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a

to except from its operation controversies "with respect to Federal taxes." (28 U. S. C., Section 2201.)[3] This action was taken in recognition of the fact that applicability of the act to income taxes would be "a complete reversal of our present scheme of taxation" and of the essential principle that taxpayers be required to "pay first and litigate later."[4] The only forum in which a taxpayer is authorized to seek a judicial determination of the correctness of an asserted tax deficiency, without first having paid it, is the Tax Court, the tribunal specially created by Congress for that purpose. If, as taxpayer contends, the District Court has jurisdiction to adjudicate the validity of the entire amount of a contested deficiency on the basis of but a partial payment of the amount in controversy, the explicit exclusion of tax contro-

---

[3] In this connection, the Senate Finance Committee stated (S. Rep. No. 1240, 74th Cong., 1st Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 651, 657)):

> Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has no application to Federal taxes. The application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that the orderly and prompt determination and collection of Federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors.

[4] See Wideman, *Application of the Declaratory Judgment Act to Tax Suits*, 13 The Tax Magazine 539, 540 (1935); Borchard, *Declaratory Judgments* (2d ed.), pp. 850, 854.

versies from the operation of the Declaratory Judgments Act may be circumvented simply by the payment of any part, however small, of the contested deficiency, followed by the institution of a "refund suit" seeking the District Court's determination that the deficiency was improperly asserted.

5. THE SCOPE OF THE "CAUSE OF ACTION" INVOLVED IN A REFUND SUIT

Furthermore, to permit a taxpayer to contest an asserted income tax deficiency by means of a refund suit based on such a partial prepayment would run counter to the basic statutory scheme for computing and collecting the income tax due. The income "tax" is a single tax imposed upon the net "taxable income" for a particular taxable year (Internal Revenue Code of 1954, Sections 1, 63)—arrived at after taking into account numerous items of gross income, deductions, credits, etc.—and a "deficiency" asserted by the Commissioner represents the difference between "the tax" imposed and the amount theretofore reported and paid (Sections 6211–6212). Even where the determination of the correct tax liability may involve several items or issues, the amount of a claimed "deficiency" is a single "sum," not an amount divisible and subdivisible into a series of component sums. This is *a fortiori* true where, as here, the validity of the entire deficiency depends upon the outcome of a single issue—namely, whether a loss sustained by the taxpayer is deductible as an ordinary loss, as he reported it, or only as a capital loss, as the Commissioner ruled in his deficiency notice. In short, when

the statutory provision conferring upon District Courts jurisdiction of refund suits is read in the light of its history, and in conjunction with related statutory provisions, it becomes clear that the phrases "any internal revenue tax" and "any sum" as used in that provision have reference, in the case of a claimed deficiency, to the entire deficiency, not just to some part of it.

A contrary construction, it should be added, would seemingly invite "splitting" of this cause of action through the filing of a multiplicity of suits with respect to the same deficiency. Under taxpayer's view of the statutory scheme for litigating deficiency determinations, a taxpayer against whom the Commissioner has asserted a deficiency might elect to contest its validity in the District Court by way of a refund suit based upon payment of only a part of the deficiency, and simultaneously contest its validity in the Tax Court by timely filing a petition for redetermination with respect to the balance. Although the first judgment entered in the two proceedings would presumably be binding in the other on collateral estoppel grounds, the statutory provision vesting in the District Courts jurisdiction over tax refund suits certainly was never designed to authorize, much less invite, a multiplicity of suits with respect to the same deficiency, either in the same forum or in different forums.[5]

[5] Congressional policy in this regard is evidenced by Section 7422 (e) of the 1954 Code (which had no counterpart in the 1939 Code), addressed to the unusual situation in which both the Tax Court and a District Court might have acquired

6. THE DECISIONS OF THE COURTS OF APPEALS

The only decision in point which lends any support to the taxpayer's argument, and upon which he chiefly relies, is *Bushmiaer* v. *United States*, 230 F. 2d 146 (C. A. 8th).[6] We submit that the reasoning of the majority opinion in that case is unpersuasive, and that the court below properly declined to follow it. The correct view, we submit, is that expressed in the dissenting opinion in the *Bushmiaer* case, *supra*, with which the court below agreed. As Judge Woodrough stated in his dissent (pp. 154–155):

> No provisions of the law justify maintenance of an action to adjudicate invalidity of a tax in order to recover a token payment that has been made thereon.
>
> Congress did not intend to prevent courts from adjudicating against the United States at some stage upon the validity of any tax laid against a taxpayer. But Congress can and has pro-

---

concurrent jurisdiction with respect to a taxpayer's tax liability for the same taxable year—namely, where the Commissioner asserts a deficiency *after* the taxpayer has paid the *entire* tax reported in his return and has already instituted a refund suit. Under Section 7422 (e), the taxpayer's *entire* tax liability in such a case must be litigated in one court or the other, either in the pending District Court suit or else by transfer to the Tax Court. See S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 610–611 (3 U. S. C. Cong. & Adm. News (1954) 4621, 5261).

[6] Because of the conflict between that decision and the decision below, and the importance of the question in the administration of the internal revenue laws, the Government did not oppose the granting of the writ of certiorari in the instant case.

> hibited judicial interference with the collecting of the tax in the first instance. * * *
>
> * * * * *
>
> * * * In the case before us plaintiffs are attempting to obtain adjudication upon the validity of taxes that have not been collected. They have delivered partial payments insignificant compared to the tax and request adjudication that the whole tax is illegal. I think all that is presented is an ingenious device to induce the court to disobey the long settled and fundamental prohibition that has been lawfully (and wisely) directed against courts interfering with the collecting of taxes in the first instance.

See also *Suhr* v. *United States*, 18 F. 2d 81, 83 (C. A. 3d); *Bendheim* v. *Commissioner*, 214 F. 2d 26, 28 (C. A. 2d); *McConkey* v. *Commissioner*, 199 F. 2d 892, 895 (C. A. 4th). Compare *Coates* v. *United States*, 111 F. 2d 609 (C. A. 2d), and *Sirian Lamp Co.* v. *Manning*, 123 F. 2d 776 (C. A. 3d).[7]

Taxpayer, like the majority in *Bushmiaer* (230 F. 2d at 151–152), suggests that the Government is free to attempt to collect the unpaid portion of the defi-

[7] In *Coates*, the taxpayer had not made full payment before bringing his refund action, but did make such payment thereafter. In *Sirian Lamp*, jurisdiction over a suit against the collector for refund of a partial payment was sustained on the theory that suits against the collector arise out of the common law and not under the statute. We believe that both of these two cases were decided erroneously, but in any event neither is applicable here. In the instant case, the taxpayer has never made payment of the balance due (*Coates*); nor is his suit one against the collector (*Sirian Lamp*). The *Coates* decision, moreover, has apparently been repudiated by the later Second Circuit decision in *Bendheim* v. *Commissioner*, 214 F. 2d 26, 28.

ciency after commencement of the refund suit. But surely the Government is not under any duty, as taxpayer apparently assumes, to perfect taxpayer's right to sue for refund by resorting to its lien foreclosure and seizure powers in order to extract from taxpayer the portion of the deficiency which he has declined voluntarily to pay. As Judge Woodrough observed in his dissenting opinion in the *Bushmiaer* case (p. 154), "no weight should be ascribed in deciding this case to existence of powers to collect unpaid portions of taxes by seizures." At any rate, taxpayer's liability for the entire deficiency—the unpaid as well as paid portion—turns upon the same legal issue (ordinary or capital loss), and the District Court's determination with respect to any part of the deficiency will necessarily be dispositive of the validity of the entire deficiency. Although taxpayer admittedly has paid only a part of the deficiency, he is here seeking in the guise of a refund action an adjudication by the District Court of his total tax liability.

7. TAXPAYER'S CLAIM OF UNDUE HARDSHIP

Equally without merit is taxpayer's charge of undue hardship in requiring him either to resort to the Tax Court for a redetermination of the Commissioner's deficiency determination, or to pay the entire deficiency as a prerequisite to a refund suit in the District Court. (Br. 9–10.) A taxpayer has ninety days from receipt of the notice of deficiency in which to decide whether to file a petition for redetermination in the Tax Court. (1954 Code, Section 6213.) Far from subjecting him to hardship, the system devised by Congress for en-

abling a taxpayer to litigate the correctness of an asserted deficiency affords him ample opportunity to select the Tax Court in lieu of a District Court as the litigation forum, and to do so without paying any part of the deficiency in advance.* Indeed, it was for the very purpose of affording taxpayers such a choice that the Tax Court was created as a specialized tribunal for adjudicating tax controversies. *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716; *Dobson* v. *Commissioner*, 320 U. S. 489. Whether any changes should be made in the existing system, and if so, what they should be, are matters for the Congress, not the courts.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals is correct and should be affirmed.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOHN N. STULL,
HARRY BAUM,
DAVID O. WALTER,
Attorneys.

MARCH 1958.

---

*Moreover, taxpayer's contention that the District Court has jurisdiction of this refund suit notwithstanding only a partial prepayment of the deficiency, because voluntary prepayment of the full amount would have entailed hardship, is scarcely consistent with his simultaneous contention that jurisdiction attached because the Government could have forced him involuntarily to pay the unpaid portion by resorting to foreclosure and seizure powers.

U. S. GOVERNMENT PRINTING OFFICE: 1958